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No. 07-468

In the Supreme Court of the United States

AMERICAN CIVIL LIBERTIES UNION, ET AL.,
PETITIONERS

v.

NATIONAL SECURITY AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners have standing to seek prospective equitable relief against a foreign intelligence-gathering program that no longer exists, without any evidence that they were ever surveilled under that program.

2. Whether petitioners' prospective challenge to the program is justiciable despite the fact that the program no longer exists.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 66a-235a) is reported at 493 F.3d 644. The decision of the district court (Pet. App. 1a-65a) is reported at 438 F. Supp. 2d 754.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2007 (Pet. App. 66a). The petition for a writ of certiorari was filed on October 3, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 11, 2001, al Qaeda agents who had entered the United States launched coordinated attacks on key strategic sites, killing approximately 3,000 peo-

ple. The President immediately declared a national emergency in view of "the continuing and immediate threat of further attacks on the United States." 66 Fed. Reg. 48,199 (2001). The United States also launched a military campaign against al Qaeda, and Congress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" of September 11. See Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224. Since that time, top al Qaeda leaders, including Osama bin Laden, have repeatedly vowed to strike America and her allies again. See, *e.g.*, *President's News Conference*, 41 Weekly Comp. Pres. Doc. 1885, 1886 (Dec. 19, 2005) (*News Conference*).

Against this backdrop, and in light of unauthorized media disclosures, the President acknowledged in December 2005 that he had authorized what he termed a Terrorist Surveillance Program (TSP) by directing the National Security Agency (NSA) to intercept international communications into and out of the United States of persons linked to al Qaeda. *News Conference* 1885. The government publicly stated that communications would be intercepted under this program only if there were reasonable grounds to believe that one party to the international communication was a member or agent of al Qaeda or an affiliated terrorist organization. See *id.* at 1889. The government has never revealed the methods and means of the TSP—including the identities of persons surveilled under that program—because of the grave harm to national security that would result from such disclosure.

In January 2007, the Attorney General publicly advised the Senate Judiciary Committee that, "on January

10, 2007, a Judge of the Foreign Intelligence Surveillance Court [FISC] issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization. As a result of these orders, any electronic surveillance that was occurring as part of the Terrorist Surveillance Program will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court." Letter from the Attorney General to the Chairman and Ranking Member of the Senate Judiciary Committee (Jan. 17, 2007). The Attorney General explained that, while "the Terrorist Surveillance Program fully complie[d] with the law," the "complex" and "innovative" FISC orders "allow[ed] the necessary speed and agility while providing substantial advantages" for conducting foreign intelligence activities. *Ibid.* "[U]nder these circumstances, the President * * * determined not to reauthorize the Terrorist Surveillance Program." *Ibid.* As a result, the program acknowledged by the President no longer exists.

2. In January 2006, while the TSP was in effect, petitioners filed this suit, which seeks only prospective equitable relief. C.A. App. 75-76. Petitioners alleged that they conducted international telephone calls for journalistic, legal, and scholarly purposes, that the TSP would likely have intercepted some of their calls, and that such interception was unlawful. *Id.* at 18. In response, the United States formally asserted the state secrets privilege through the then-Director of National Intelligence, John Negroponte, and the NSA's Signals Intelligence Director, Major General Richard Quirk. Director Negroponte and General Quirk explained in public declara-

tions that "to discuss the TSP in any greater detail [than has been made public] * * * would disclose classified intelligence information and reveal intelligence sources and methods, which would enable adversaries of the United States to avoid detection by the U.S. Intelligence Community and/or take measures to defeat or neutralize U.S. intelligence collection, posing a serious threat of damage to the United States' national security interests." *Id.* at 164; see *id.* at 170. The government also provided the district court with *ex parte, in camera* classified declarations of both Director Negroponte and General Quirk elaborating on the details of the TSP and the government's assertion of the state secrets privilege.

3. The district court permanently enjoined further use of the TSP. Pet. App. 1a-65a. The court first determined that the government had "appropriately invoked" the state secrets privilege. *Id.* at 16a. "After reviewing [the classified] materials," the court explained that it was "convinced that the privilege applies 'because a reasonable danger exists that disclosing the information in court proceedings would harm national security interests, or would impair national defense capabilities, disclose intelligence-gathering methods or capabilities, or disrupt diplomatic relations with foreign governments.'" *Id.* at 17a (quoting *Tennenbaum* v. *Simoni*, 372 F.3d 776, 777 (6th Cir.), cert denied, 543 U.S. 1000 (2004)). The court nevertheless declined to dismiss the case, concluding that petitioners' challenge could proceed on the theory that their "claims regarding the TSP are based solely on what Defendants have publicly admitted." *Id.* at 18a.

The district court held that petitioners had established standing to challenge the TSP because they "are not merely alleging that they 'could conceivably' become

subject to surveillance under the TSP, but that continuation of the TSP has damaged them." Pet. App. 27a. On the merits, the court held that "searches conducted without prior approval by a judge or magistrate [are] per se unreasonable" under the Fourth Amendment, and that the TSP violated the First and Fourth Amendments for that reason. *Id.* at 34a, 47a. The court went on to state that the TSP violated the constitutional separation of powers because it was inconsistent with the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. 1801 *et seq.*, which generally requires the government to obtain the approval of the FISC for "electronic surveillance." Pet. App. 51a-52a.[1]

4. The government appealed and obtained a stay of the district court's injunction. After the Attorney General publicly advised the Senate Judiciary Committee of the January 2007 FISC orders, see pp. 2-3, *supra*, the government filed a supplemental submission in the court of appeals urging that this case was moot. The government explained that the TSP no longer had any live significance because, "[a]s a result of the new orders, any electronic surveillance that was conducted as part of the TSP is now being conducted subject to the approval of the [FISC]." Decl. of Lieutenant General Keith B. Alexander, Director, NSA ¶ 3 (Jan. 24, 2007) (Alexander Decl.).

5. Without reaching the government's mootness argument, the court of appeals vacated the judgment of

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[1] The district court granted the government's summary judgment motion with respect to petitioners' "datamining" claim, which challenged a different alleged surveillance activity. See Pet. App. 20a-21a. The court of appeals affirmed the dismissal of that claim, *id.* at 158a, and petitioners do not challenge that determination in this Court, Pet. 4 n.9, 7 n.11.

the district court and remanded with instructions to dismiss for lack of standing. See Pet. App. 67a, 74a-75a n.4.

a. In the lead opinion, Judge Batchelder emphasized that petitioners "have not challenged on appeal either the invocation or the grant of the state secrets privilege." Pet. App. 72a n.3. With respect to standing, Judge Batchelder explained that petitioners "do not—and because of the State Secrets Doctrine cannot—produce any evidence that any of their own communications have ever been intercepted by the NSA, under the TSP, or without warrants." *Id.* at 78a. Moreover, petitioners "do *not* allege as injury that they personally, either as individuals or associations, anticipate or fear any form of direct reprisal by the government * * * such as criminal prosecution, deportation, administrative inquiry, civil litigation, or even public exposure." *Id.* at 79a. Instead, Judge Batchelder explained, petitioners alleged "only a subjective apprehension and a personal (self-imposed) unwillingness to communicate" out of fear that some of their communications might be intercepted under the TSP. *Id.* at 100a.

Judge Batchelder held that petitioners' attempt to establish standing based on a subjective chilling effect fails under this Court's decision in *Laird* v. *Tatum*, 408 U.S. 1 (1972), which she construed to hold that "a plaintiff must establish that he or she is regulated, constrained, or compelled directly by the government's actions, instead of by his or her own subjective chill." Pet. App. 96a. Judge Batchelder further rejected petitioners' contention that they possess standing because their reluctance to communicate electronically has caused them professional harm. *Ibid.* She explained that such an exception to *Laird* "would effectively value commer-

cial speech above political speech," even though the latter is entitled to greater protection. *Ibid.*

In addition, Judge Batchelder determined that, even if petitioners had suffered a cognizable injury, any such injury was not caused by the TSP and would not be redressable by a favorable decision in this case. Pet. App. 112a-116a, 119a-123a. Because petitioners assert that their overseas contacts are "the types of people likely to be monitored by the NSA," their communications might be monitored under FISA or some other source of law even apart from the TSP. *Id.* at 114a-115a. Thus, Judge Batchelder concluded, petitioners would face the same chilling effect even if the TSP were enjoined. *Ibid.*

b. Judge Gibbons concurred in the judgment. Pet. App. 159a-170a. She determined that "[t]he disposition of all of the plaintiffs' claims depends upon the single fact that the plaintiffs have failed to provide evidence that they are personally subject to the TSP." *Id.* at 159a. In her view, "a plaintiff must be actually subject to the defendant's conduct, not simply afraid of being subject to it." *Id.* at 164a.

c. Judge Gilman dissented. Pet. App. 171a-233a. He believed that the attorney-plaintiffs have standing because, "as part of their representation of clients accused of being enemy combatants or of providing aid to organizations designated as terrorist groups * * * these attorneys have communicated with potential witnesses, experts, lawyers, and other individuals who live and work outside the United States about subjects such as terrorism, jihad, and al-Qaeda." *Id.* at 177a-178a. On the merits, Judge Gilman "conclude[d] that the TSP violates FISA and Title III [of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82

Stat. 212 (18 U.S.C. 2510 *et seq.*)] and that the President does not have the inherent authority to act in disregard of those statutes." *Id.* at 217a; see *id.* at 217a-233a.

6. On August 5, 2007, after the court of appeals' ruling, Congress enacted the Protect America Act (PAA), Pub. L. No. 110-55, 121 Stat. 552. Among other things, the PAA provides that "[n]othing in the definition of electronic surveillance under [FISA] shall be construed to encompass surveillance directed at a person reasonably believed to be located outside the United States." § 2, 121 Stat. 552. The PAA provides for procedures governing the acquisition of foreign intelligence information concerning persons reasonably believed to be outside the United States, review of those procedures by the FISC, and mandatory reporting to Congress by the Attorney General. §§ 2-4, 121 Stat. 552-556. The PAA specifies that, except as otherwise provided, "the amendments made by this Act shall take effect immediately after the date of the enactment of this Act," and "shall cease to have effect 180 days after the date of the enactment of this Act." § 6, 121 Stat. 556-557.

ARGUMENT

Petitioners argue (Pet. 19-32) that they have standing to seek prospective equitable relief against the TSP—a program that no longer exists—on the ground that it was unlawful. Petitioners do not, however, challenge the district court's determination that the state secrets privilege bars them from proving that they were surveilled under that program. The court of appeals' holding that petitioners cannot establish standing without such evidence is correct and does not conflict with any decision of this Court or any other court of appeals. Indeed, petitioners candidly and correctly conceded be-

low that their standing theory is "unprecedented." Pet. App. 82a n.11, 88a n.17. Petitioners' challenge to the legality of the TSP is not properly presented in this case, not only because petitioners lack standing, but also because the court below did not reach that question. Moreover, the government's discontinuance of the TSP in January 2007, and Congress's subsequent enactment of the PAA, deprived this action—which seeks only prospective equitable relief against the TSP—of any continuing, live significance. Further review is unwarranted.

1. a. Petitioners do not challenge the district court's holding that the government properly invoked the state secrets privilege and that the privilege protects against disclosure of whether petitioners were surveilled under the TSP. After reviewing the classified materials that the government had submitted for *ex parte*, *in camera* review, the district court correctly found that the government had properly invoked the state secrets privilege, and that "the information for which the privilege is claimed qualifies as a state secret," because "a reasonable danger exists that disclosing the information in court proceedings would harm national security interests." Pet. App. 17a (citations omitted).

The information protected by the state secrets privilege includes "whether [petitioners] have been subject to surveillance by the NSA," as well as other facts concerning "intelligence activities, sources, methods, or targets" of the TSP. C.A. App. 164; see *id.* at 170. As the government's public declarations explained:

> [D]isclosure of those who are targeted by [intelligence] activities would compromise the collection of intelligence information just as disclosure of those who are not targeted would reveal to adversaries that certain communications channels are secure or,

> more broadly, would tend to reveal the methods being used to conduct surveillance. The only recourse for the Intelligence Community and, in this case, for the NSA, is to neither confirm nor deny these sorts of allegations, regardless of whether they are true or false. To say otherwise when challenged in litigation would result in routine exposure of intelligence information, sources, and methods and would severely undermine surveillance activities in general.

Id. at 164-165; see *id.* at 170; cf. *Al-Haramain Islamic Found., Inc.* v. *Bush*, No. 06-36083, 2007 WL 3407182, at *12 (9th Cir. Nov. 16, 2007) (holding that "information as to whether the government surveilled [the plaintiff]" under the TSP was a state secret, and that "the basis for the privilege [was] exceptionally well documented" in the government's *in camera, ex parte* affidavits).

Petitioners did "not challenge[] on appeal either the invocation or the grant of the state secrets privilege," and the court of appeals did not pass upon those questions. Pet. App. 72a n.3; accord *id.* at 168a (Gibbons, J., concurring in the judgment). Thus, the question is not properly before this Court, see, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992), and the case therefore comes to this Court on the premise that petitioners cannot prove that they were surveilled under the TSP. See Pet. App. 83a ("[P]laintiffs concede that there is no single plaintiff who can show that he or she has actually been wiretapped.").

b. That fact is fatal to petitioners' attempt to prove standing. The Constitution "requires the party who invokes the court's authority to show that he *personally* has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Valley Forge Christian Coll.* v. *Americans United for Sepa-*

ration of Church & State, Inc., 454 U.S. 464, 472 (1982) (citation omitted; emphasis added). Thus, "persons who [a]re not parties to unlawfully overheard conversations * * * d[o] not have standing to contest the legality of the surveillance" on Fourth Amendment grounds. *Rakas* v. *Illinois*, 439 U.S. 128, 136 (1978). There is no reason to reach a different conclusion about petitioners' other claims.

In analogous circumstances, courts have consistently held that a plaintiff lacks standing to challenge a government surveillance program where, as here, the state secrets privilege prevents the plaintiff from establishing, and the government from refuting, that he was surveilled. For example, in *Halkin* v. *Helms*, 690 F.2d 977 (D.C. Cir. 1982), plaintiffs argued that their names were included on "watchlists" used to govern NSA surveillance, and that there was therefore a "substantial threat" that their communications would be intercepted. See *id.* at 983-984, 997. The District of Columbia Circuit nevertheless affirmed the dismissal of the plaintiffs' Fourth Amendment claim, "hold[ing] that [plaintiffs'] inability to adduce proof of actual acquisition of their communications" rendered them "incapable of making the showing necessary to establish their standing to seek relief." *Id.* at 998; accord *Ellsberg* v. *Mitchell*, 709 F.2d 51, 65 (D.C. Cir. 1983) (holding that the case had to be dismissed because plaintiff could not, absent recourse to state secrets, establish that he was surveilled).

Most recently, the Ninth Circuit unanimously held in *Al-Haramain* that a plaintiff lacked standing to challenge the TSP. 2007 WL 3407182, at *14. The Ninth Circuit explained that "information as to whether the government surveilled [the plaintiff]" under the TSP was a state secret, *id.* at *12, and that, without such in-

formation, the plaintiff "cannot establish that it has standing," *id.* at *14. In *Al-Haramain*, the plaintiff alleged that it had seen a classified document indicating that it had been subject to surveillance under the TSP. See *id.* at *1. Petitioners here offer nothing to establish standing other than claims of subjective "chill" on their speech or activities.[2]

The holdings of those cases are reinforced by FISA—the statute on which petitioners principally rely. FISA authorizes only an "aggrieved person" to bring a civil action challenging the acquisition of communications contents. 50 U.S.C. 1801(f) (2000 & Supp. IV 2004); 50 U.S.C. 1810. To ensure that the term "aggrieved person" is "coextensive [with], but no broader than, those persons who have standing to raise claims under the Fourth Amendment with respect to electronic surveillance" (H.R. Rep. No. 1283, 95th Cong., 2d Sess. 66 (1978)), Congress defined the term "aggrieved person" to mean one "whose communications or activities were *subject to* electronic surveillance" or who was *targeted by* such surveillance. 50 U.S.C. 1801(k) (emphasis added). Litigants who cannot establish their status as "aggrieved person[s]" do "not have standing" under "any" of FISA's provisions. H.R. Rep. No. 1283, *supra*, at 89-90. Because petitioners cannot prove that they

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[2] The *Al-Haramain* court remanded for the district court to determine, in the first instance, whether FISA preempts the state secrets privilege. 2007 WL 3407182, at *14. That question is not presented here because petitioners have not challenged the applicability of the state secrets privilege and, in any event, have never claimed, in the lower courts or in their petition for a writ of certiorari, that FISA displaces that privilege. Moreover, no court has ever held that FISA has that effect.

were surveilled, the court of appeals correctly held that their suit must be dismissed for lack of standing.

c. Petitioners nonetheless contend (Pet. 4-6) that they have standing because they chose not to communicate electronically with third parties, and third parties declined to communicate electronically with them, out of fear that their communications would be intercepted under the TSP. As Judge Batchelder explained, a person's own decision to cease expressive activity does not establish standing. Pet. App. 96a; see *Laird* v. *Tatum*, 408 U.S. 1, 11 (1972); *United Presbyterian Church* v. *Reagan*, 738 F.2d 1375, 1380 (D.C. Cir. 1984) (Scalia, J.).

That conclusion follows directly from *Laird*. In *Laird*, "most if not all of the [plaintiffs]" established that they had "been the subject of Army surveillance reports." *Tatum* v. *Laird*, 444 F.2d 947, 954 n.17 (D.C. Cir. 1971), rev'd on other grounds, 408 U.S. 1 (1972). They argued that the surveillance of their activities had "chill[ed]" their exercise of First Amendment rights. *Laird*, 408 U.S. at 13. This Court nevertheless held that the plaintiffs failed to demonstrate "a direct injury as the result of [the government's] action," because their decision to curtail their expressive activity reflected a "subjective 'chill'" that did not qualify as a "specific present objective harm or a threat of specific future harm." *Id.* at 13-14 (citation omitted).

The Court in *Laird* explained that "none" of its decisions in which government action violated the First Amendment because of its "'chilling' effect" on expressive activity found standing based on a plaintiff's knowledge of government activity and his "fear that, armed with the fruits of those activities, the [government] might" take other injurious action. 408 U.S. at 11. Rather, those cases involved harms directly caused by

"the challenged exercise of governmental power" because the "complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging." *Ibid.*

Petitioners argue (Pet. 23) that *Laird* merely held that a plaintiff must prove some injury to establish standing. But the injuries alleged by petitioners all result from an alleged chilling effect on their communications, and that is precisely what *Laird* held insufficient to confer standing. Indeed, petitioners' asserted injury is even weaker than the one rejected in *Laird*. As Judge Batchelder explained, petitioners rely in large part on alleged injuries caused by alleged decisions of third parties—their foreign contacts—to cease communicating with them. See Pet. App. 116a-117a. A chilling effect on third parties is an even less appropriate basis for standing than a chilling effect on petitioners themselves. See *ibid.* Because "a federal court [may] act only to redress injury that fairly can be traced to the challenged action of the defendant," *Simon* v. *East Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976), standing is ordinarily "substantially more difficult" to establish where the claimed injury is the result of the independent actions of third parties. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (citation omitted).

That does not mean, as petitioners suggest (Pet. 14), that no plaintiff will ever have standing to challenge any government surveillance program. The district court's unchallenged state secrets determination precludes petitioners from attempting to prove their standing to challenge the TSP. But the state-secrets privilege is not lightly invoked, and the government's assertion of the privilege is subject to judicial review, as it was by the district court (which concluded that it was properly in-

voked by the government here). See Pet. App. 16a-17a; *United States* v. *Reynolds*, 345 U.S. 1, 8 (1953). Moreover, if the government sought to use the results of any surveillance against a person, that person might be able to prove standing based on the government's disclosure of the surveillance and any injury caused by the attempted use. In any event, it is well settled that "[t]he assumption that if [petitioners] have no standing to sue, no one would have standing, is not a reason to find standing." Pet. App. 130a (quoting *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974)).[3]

d. Even if petitioners had established a relevant injury, they would still lack standing because they could not prove that the TSP caused their asserted injury or that the injury would be redressed by an injunction against the TSP. Cf. *Defenders of Wildlife*, 504 U.S. at 560-562. Under petitioners' own theory, the people they would like to telephone are suspected terrorists who might be subject to FISA-authorized surveillance or surveillance by their own (foreign) governments. See Pet. App. 114a. Thus, even if a chilling effect could give rise to a cognizable injury for standing purposes, it is at best speculative to assert that any chilling effect was caused by *the TSP*, as opposed to other sources, or that any injury from a chilling effect would be redressed by enjoining the TSP. As Judge Batchelder explained, peti-

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[3] Nor are petitioners (Pet. 15, 19, 26) correct that, under the court of appeals' decision, a plaintiff must prove surveillance "with certainty." Proof by a preponderance of the evidence would suffice. Here, however, petitioners' contention that they have been surveilled is "purely speculative." Pet. App. 163a (Gibbons, J., concurring in the judgment). As Judge Batchelder explained, "[t]he evidence establishes only a *possibility* not a *probability* or certainty that these communications might be intercepted." *Id.* at 128a (second emphasis added).

tioners "have neither asserted nor proven any basis upon which to justifiably conclude that the mere absence of a warrant [under the TSP] * * * is the cause of [petitioners'] (and their overseas contacts') reluctance to communicate by telephone or email." *Id.* at 113a. That was true when the TSP existed, and it is especially true now that the TSP *no longer exists*.

e. There is no circuit split on the question presented here, and petitioners' contrary contention (Pet. 21) is undercut by their concession below that, at least for their Fourth Amendment claim, "it would be unprecedented for a court to find standing" without proof that the plaintiff's communications were intercepted. Pet. App. 82a n.11, 88a n.17. Petitioners assert (Pet. 21) that courts disagree on whether injury, traceability, and redressability suffice to establish standing to challenge a surveillance program. But no court disagrees that those are the requirements for Article III standing; instead, the question in each case is whether, on the facts of the case, those requirements are satisfied.

While petitioners allege (Pet. 21) that the decision below conflicts with *Ozonoff* v. *Berzak*, 744 F.2d 224 (1st Cir. 1984), and *Presbyterian Church* v. *United States*, 870 F.2d 518 (9th Cir. 1989), the court of appeals correctly distinguished both of those cases, along with the other cases on which petitioners relied below. Pet. App. 103a-104a, 106a-109a; see *id.* at 166a (Gibbons, J., concurring in the judgment).

In *Ozonoff*, the government required the plaintiff to submit to a "loyalty screening" program as a condition to seeking a job. 744 F.2d at 226, 229. Here, in contrast, petitioners have not proven that the government targeted them in any way; the government has not required petitioners to do anything (much less take a loyalty

test); and the government has not sought to impose any consequences for anything petitioners might have done. *Ozonoff* drew that very distinction by emphasizing that the plaintiff there, unlike the plaintiffs in *Laird*, "claim[ed] that the information gathering activities were directed against [him] specifically." *Id.* at 229. Moreover, there was no analogous redressability issue in *Ozonoff* because the loyalty-screening requirement was the clear cause of the plaintiff's injury. *Id.* at 230.

In *Presbyterian Church*, the plaintiff churches alleged that the government had surreptitiously recorded worship services and thereby deterred the churches' members from attending worship services. 870 F.2d at 521-522. The Ninth Circuit held that the churches had suffered an "organizational injury" based on the surveillance of their own services. *Id.* at 522. Here, in contrast, petitioners cannot prove that they (or any members of theirs) were surveilled. Moreover, the Ninth Circuit relied in part on a reputational injury to the churches, *id.* at 522-523—a type of injury that is not at issue here. Nor did *Presbyterian Church* present the same redressability issue that is presented here, because the plaintiffs there challenged the only relevant surveillance. Cf. *id.* at 523. The absence of a conflict with the Ninth Circuit's *Presbyterian Church* decision is further confirmed by that circuit's recent holding in *Al-Haramain*—a far more analogous case than *Presbyterian Church*—that "information as to whether the government surveilled [the plaintiff]" under the TSP was a state secret, 2007 WL 3407182, at *12, and that, with-

out such information, the plaintiff in that case could not "establish that it has standing," *id.* at *14.[4]

2. Petitioners (Pet. 28-32) also ask this Court to address a question that neither the court of appeals below nor any other appellate court has addressed: whether the TSP was lawful. The court of appeals did not reach that issue because of its holding that petitioners lack standing. And because "this is a court of final review and not first view," *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 110 (2001) (citation omitted), that question is not properly presented by this case.

Petitioners' challenge to the TSP also has been overtaken by intervening events—the TSP no longer exists. Indeed, the TSP is now two steps removed from current activities.

Petitioners filed this action in January 2006 seeking prospective relief against the TSP. See C.A. App. 18-19.

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[4] Petitioners' reliance (Pet. 26) on environmental cases is misplaced for similar reasons. See Pet. App. 154a-155a; *id.* at 161a-164a (Gibbons, J., concurring in the judgment). An environmental plaintiff can generally establish standing by showing that he uses an area affected by pollution and has reduced that use because he reasonably fears injury from the pollution. See, *e.g.*, *Friends of the Earth, Inc.* v. *Laidlaw Env'tl Servs., Inc.*, 528 U.S. 167, 183-184 (2000). As Judge Batchelder explained, however, just as environmental plaintiffs cannot establish standing "without any evidence that the defendant has polluted their particular river," petitioners here cannot establish standing without "evidence that the government has intercepted their particular communications." Pet. App. 155a; see *id.* at 161a (Gibbons, J., concurring in the judgment) (emphasizing that, in *Laidlaw*, "the plaintiffs * * * were *in fact subject to defendant's conduct*"). Thus, for example, in *Laidlaw*, the plaintiff submitted detailed declarations from its members explaining that they had direct exposure to the waterborne pollution at issue in that case. See 528 U.S. at 181-183. Petitioners here, by contrast, cannot show that they have ever been subject to the activity about which they complain.

The suit was predicated on the notion that the TSP was unlawful because it authorized electronic surveillance "without court approval." *Id.* at 18, 29. In the wake of the January 2007 FISC orders, however, the President allowed the TSP to lapse, and any electronic surveillance that had been occurring as part of the TSP then began to be conducted subject to the approval of the FISC. See Alexander Decl. ¶¶ 3-4. While the court of appeals declined to reach the government's mootness argument because the court found that petitioners lack standing, Pet. App. 74a-75a n.4, the termination of the relevant program nearly a year ago renders the controversy moot and, *a fortiori*, counsels strongly against this Court's review of this case and certainly petitioners' merits arguments. There is no live controversy as to petitioners' prospective-only challenge to a program that no longer exists.

Moreover, after the court of appeals issued its ruling in this case, Congress changed the legal landscape yet again by enacting the Protect America Act in August 2007. Among other things, the PAA provides that FISA's limitations on "electronic surveillance" do not apply to "surveillance directed at a person reasonably believed to be located outside of the United States." § 2, 121 Stat. 552. On a prospective basis, therefore, the PAA defeats the essential premise underlying petitioners' case: that the surveillance that used to be conducted under the TSP—*i.e.*, surveillance in which one party to the communication is located outside of the United States—is statutorily subject to FISA's requirements for electronic surveillance.

Petitioners all but concede that their challenge to the TSP lacks prospective significance by arguing (Pet. 27) that they "continue to suffer injury to the extent that

executive branch officials are conducting surveillance *under the PAA* without meaningful judicial review" (emphasis added). Petitioners further state (Pet. 14) that the court of appeals' decision that they lack standing "forecloses [them] from amending their complaint to challenge the constitutionality of the [PAA]." Those contentions only underscore that petitioners no longer suffer any injury from the TSP, which is the only program petitioners have challenged in *this* case. If petitioners or others wish to file a suit challenging the PAA, they are free to do so.[5] But that is no reason to review petitioners' standing to challenge the now-defunct TSP, much less to consider the merits of their challenge to that program.

Pointing to the PAA's sunset clause, which generally provides that the amendments made by the PAA will cease to have effect in February 2008, see PAA § 6(c), 121 Stat. 557, petitioners observe (Pet. 13, 29-30, 32) that the PAA might not be extended or reenacted in its current form, and that the current or a subsequent President might decide at some future point to reinstate the TSP. But it seems much more likely that Congress would choose to extend the PAA or supplant it with more permanent legislation. In any event, such speculation serves only to underscore the absence of a live controversy concerning the discontinued TSP at this time. And even if the Executive were to implement a future program that was not subject to judicial supervision,

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[5] At least one such case is pending, along with dozens of other cases involving related issues that have been consolidated for pretrial purposes in a multi-district litigation proceeding in *In re NSA Telecommunications Records Litigation*, MDL No. 06-1791 (N.D. Cal.). Unlike this case, many of those cases involve claims for retrospective monetary relief.

there is no reason to believe that it would be materially indistinguishable from the TSP. At most, the potential lapse of the PAA means only that the TSP may be *three* steps removed from activities occurring at the time this Court could consider this case.

This Court has stressed that federal courts must avoid needlessly addressing serious constitutional issues, see, *e.g.*, *INS* v. *St. Cyr*, 533 U.S. 289, 299-300 (2001), and should proceed with special caution where the President's war powers are implicated, see *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 539 (2004) (plurality opinion). Those considerations are especially apt here, where litigating the merits of petitioners' claims would require delving into sensitive state secrets and possibly deciding delicate constitutional questions concerning the scope of the President's constitutional authority to conduct foreign intelligence surveillance in wartime.

3. In any event, petitioners' failure to take issue with the district court's state secrets ruling dooms their claims on the merits. In challenging the TSP, petitioners rely (Pet. 28) on FISA, which imposes various limitations on "electronic surveillance." 50 U.S.C. 1809(a). As Judge Batchelder determined, petitioners cannot prevail on their contention that the TSP violated FISA because, in light of the state secrets doctrine (which petitioners have not challenged), they cannot show that the TSP relied on "electronic surveillance" within the meaning of FISA. Pet. App. 145a-146a, 150a.

More fundamentally, any consideration of the merits of petitioners' challenges to the TSP would require consideration of materials protected by the state secrets privilege. Their Fourth Amendment challenge, for example, would require consideration of information encompassed by the state secrets privilege, including in-

formation concerning the need for the TSP to protect national security and the extent to which the TSP was tailored as an effective response. Thus, even if petitioners could establish standing, the state secrets privilege would preclude litigation of the merits of their claims. See *Halkin*, 690 F.2d at 1000 (holding that Fourth Amendment claim challenging warrantless surveillance is "impossible" to adjudicate where state secrets privilege encompasses facts relevant to reasonableness inquiry).

Above all, however, this petition provides no occasion for this Court to wade into such sensitive issues in light of the facts that petitioners have failed to establish standing and that the program they seek to enjoin on a prospective basis (only) no longer exists.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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